IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Supreme Court, U. S.
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No. 76-6997

SANDRA LOCKETT,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF RESPONDENT

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Respondent is generally satisfied with the constitutional provisions and statutes provided by Petitioner. However, the Respondent would offer the following additions.

2. Article IV, Section 2 of the Ohio Constitution: (B)(2) The Supreme Court shall have appellate

jurisdiction as follows: (d) In appeals from the courts of appeals as a matter of right in the following cases:

(i) Cases originating in the Courts of Appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

3. Ohio Revised Code Ann. Sec. 2923.03 (Baldwin, 1974) *Complicity*.

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

HISTORY: 1972 H 511, eff. 1-1-74

LEGISLATIVE SERVICE COMMISSION NOTE (1973)**

In essense, this section codifies existing case law with respect to "aiding and abetting." Under the section, an accomplice is one who solicits, procures, or conspires with another to commit an offense, aid or abets its commission, or causes an innocent or irresponsible person to commit the offense.

It is unnecessary that the principal offender be convicted before an accomplice can be convicted. An offense must actually be committed, however, before a person may be convicted as an accomplice. The single exception to this rule permits conviction as an accomplice in an attempt to commit an offense. A person accused of complicity may defend on the ground that prior to an attempt or the commission of the offense, he quit his part in it, under circumstances showing that he completely and voluntarily gave up his criminal purpose.

Accomplices are liable to prosecution and punishment as principal offenders. For example, an accomplice to aggravated murder is liable to the death penalty the same as the actual murderer.

In charging complicity, the accused may be charged specifically as an accomplice under this section, or he may be charged simply as a joint offender in the offense committed.

**The Ohio Supreme Court has recognized that, "while not decisive" the Legislative Service Commission notes are persuasive authority for the intent of the General Assembly (Ohio Legislature). *Weiss v. Porterfield* (1971), 27 Ohio St.2d 117, 120.

4. Ohio Revised Code Ann. Sec. 2901.22 (Baldwin, 1974) *Culpable Mental States.*

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

QUESTIONS PRESENTED

I. PROSECUTOR'S CLOSING REMARKS

A. Whether the prosecutor's remarks in his closing statement, that the State's evidence was uncontradicted, were manifestly intended, or of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the petitioner to testify.

B. Whether the prosecutor's remarks in closing argument were harmless error.

C. Whether the petitioner's failure to object to the prosecutor's remarks constituted a waiver of this issue.

II. THE DEATH PENALTY WAS APPLIED CONSTITUTIONALLY

A. Whether the Ohio death penalty statutes place unconstitutional limitations upon the consideration of mitigating circumstances.

B. Whether the death penalty is disproportionately severe and unconstitutional for one who is a major participant in the killing of another, although she did not pull the trigger.

C. Whether there is a constitutional requirement that a jury take part in sentencing in a capital case.

D. Whether Ohio's capital sentencing procedures impermissibly penalize exercise of the right to plead not guilty and to have a jury trial.

E. Whether there is a constitutional requirement that the state bear the burden of proof at a sentencing hearing in a capital case.

III. Whether in a capital case venireman are properly excused for cause where their conscientious scruples about capital punishment preclude them from following the judge's instructions, or taking an oath as a juror.

IV. Whether retroactivity is an issue where there has been no change in the judicial interpretation of a statute.

STATEMENT OF THE CASE

On January 15, 1975, Sydney Cohen was shot and killed in his pawn shop, located in downtown Akron, Ohio. On January 21, 1975, the Petitioner, Al Parker, Nathan Earl Dew, and James Lockett were indicted by the Summit County Grand Jury regarding the Cohen homicide. Each of the named defendants was charged with Aggravated Murder (felony murder) including Specifications, and Aggravated Robbery.

Prior to the commencement of any trial, the Petitioner, and each of the other defendants, were offered a negotiated plea by the State of Ohio. Al Parker, the self-confessed triggerman, was offered the dismissal of the specifications and robbery charge if he would plead guilty to Aggravated Murder and testify on behalf of the State of Ohio. Parker, who was scheduled to go on trial first, accepted this negotiated plea at the commencement of his trial.

The Petitioner, approximately two weeks prior to her trial, was offered the negotiated plea of Voluntary Manslaughter and Aggravated Robbery if she would cooperate with the State of Ohio. The Petitioner rejected this negotiation. James Lockett and Nathan Earl Drew were also offered the same negotiations presented the Petitioner. James Lockett and Dew also rejected these pre-trial negotiations.

Two days prior to the commencement of the Petitioner's trial on March 28, 1975, after the State had prepared its case, the Petitioner was offered the same negotiated plea that was accepted by Parker (Aggravated Murder). This offer was rejected. The offer was renewed on April 1, 1975, when the trial began

and was again rejected by the Petitioner. A.60.[1] The Petitioner was subsequently found guilty on April 3, 1975, by jury, of Aggravated Murder, with two Specifications, and Aggravated Robbery. The trial court, upon completion of the statutory sentencing requirements, found no mitigating circumstances and sentenced the Petitioner to death.

The trials of Nathan Earl Dew and James Lockett were conducted prior to the Petitioner's trial. Both Dew and James Lockett were offered the "Day of Trial" negotiation of Aggravated Murder. James Lockett and Dew both rejected the State's offers. Upon completion of their jury trials, Dew and James Lockett were each found guilty of Aggravated Murder with one Specification, and Aggravated Robbery. The trial court found mitigation in Dew's case, and sentenced Dew to life in prison. The trial court found no mitigation in James Lockett's case and sentenced him to death.

Since Dew had confessed, Al Parker's testimony was not used in the Dew trial. Al Parker did testify in the trial of the Petitioner and James Lockett. After the completion of the three trials, Al Parker was sentenced to life in prison, pursuant to his prior guilty plea to Aggravated Murder.

The Ohio Ninth District Court of Appeals affirmed the convictions of the Petitioner, Nathan Earl Dew, and James Lockett. The Supreme Court of Ohio declined to hear Dew's appeal and affirmed the Petitioner's conviction. 49 Ohio St. 2d 48. The convictions of

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[1] Numbers preceded by "A" refer to pages of the Appendix; numbers preceded by "R" refer to transcript pages not reproduced in the Appendix.

James Lockett, were reversed by the Ohio Supreme Court in *State v. Lockett*, 49 Ohio St.2d 71 (1976). James Lockett was retried, but the jury was unable to reach a verdict. A third trial by jury of James Lockett resulted in verdicts of guilty as charged. Mr. Lockett has been sentenced to death.

Since the Respondent does not agree with the conclusions of fact presented by the Petitioner in her Statement of the Case, the State respectfully offers the following summary of evidence.

Al Parker testified that, prior to coming to Akron on January 14, 1975, he was a resident of Orange, New Jersey. During the weekend prior to coming to Akron, Parker indicated that he met, for the first time, Joanne Baxter and the Petitioner in Jersey City, New Jersey (Friday, January 10, 1975). Baxter and the Petitioner, residents of Akron, were visiting the New Jersey area, and were apparently staying with relatives. A.28-30.

As the weekend progressed, Parker introduced Baxter and the Petitioner to his friend, Nathan Earl Dew. A. 30-31. Parker became attracted to Baxter, while Dew accompanied the Petitioner. During the remainder of the weekend, the couples separated.

On Monday, January 13, 1975, Dew borrowed sixty dollars from Parker, so that Dew could make bail for the Petitioner's brother, James Lockett. A. 37. After James Lockett was released from jail, Joanne Baxter, the Petitioner, David Ford (the Petitioner's seventeen year old uncle), and James Lockett planned to return to Akron in the Petitioner's car. A. 37.

Dew and Parker agreed to lead the Petitioner to the interstate highway for the return trip to Akron. Because of bad weather and trouble with the Petitioner's car,

Dew and Parker eventually accompanied the group all the way to Akron. Since Parker was the only one with money, he financed the group's trip home, including an overnight stay in Pennsylvania, from money that he had originally borrowed from his employer. A. 38-39.

Parker and Dew arrived in Akron on January 14, 1975, with the Petitioner, James Lockett, Ford, and Baxter. After the Petitioner was taken to the local Methadone Clinic for her heroin substitute, and after Joanne Baxter was taken home, Parker and Dew, along with the others, eventually ended up at the Lockett residence. A. 41-42.

Since James Lockett did not pay back Parker as planned, and because of no money to go home, Parker and Dew discussed pawning Dew's ring. A. 41. When the Petitioner and James Lockett became part of this conversation (with only Dew, Parker, James Lockett, and the Petitioner participating), the Petitioner suggested a robbery. A. 41. The Petitioner then proceeded to suggest and point out certain business establishments that might be suitable as a target for the robbery. A. 42-43. Because none of the four had a pistol, James Lockett suggested robbing a pawn shop where they could ask to see a pistol, load it, and then use it to rob the pawn shop. Since Parker already had four cartridges in his possession, Parker was elected to be the triggerman at the suggestion of James Lockett. A. 46. The Petitioner offered to lead the group to the pawn shop, but suggested that she not actually go in because the pawn shop operator knew her. A. 46. After it was determined that the robbery would take place the next day, Dew and the Petitioner, using Parker's car, dropped Parker off at Joanne Baxter's house on Tuesday evening. A. 47.

The next morning, January 15, 1975, Dew, James Lockett, and the Petitioner, using Parker's car, picked up Parker at Baxter's apartment A. 48-49. According to Parker, the robbery plan called for Dew and James Lockett to enter Syd's Market Loan, in downtown Akron, pawning Dew's ring. Parker was then to follow, look at a pistol, and carry out the robbery. The Petitioner was to stay in Parker's car, wait two minutes, and then start the engine. A. 49-50.

The actual robbery commenced during the noon hour with Dew and James Lockett entering the pawn shop as planned. Approximately a minute later, Parker left the car and entered the pawn shop. Parker indicated that when he entered, the owner, Sydney Cohen, was the only person present besides Dew and James Lockett. At Parker's request, Cohen showed him a pistol. Parker returned this pistol, at which point Dew pointed out a larger pistol, which Parker suggested. A. 49-50. Parker then took two cartridges out of his pocket, loaded the pistol, and declared that this was a stickup. The gun was pointed at Cohen with Parker's finger on the trigger. Parker testifed that the weapon went off when Cohen grabbed at the pistol. As Cohen went down, he activated the robbery alarm behind the counter. A. 50-51.

The trio ran when Parker indicated that the alarm had been pushed. Parker kept the gun as he ran for his car. The Petitioner was in Parker's car when he returned. The engine was running, but Dew and James Lockett did not return to Parker's car. The Petitioner took the gun Parker had taken from the pawn shop and put it in her purse. Parker and the Petitioner proceeded to the home of the Petitioner's aunt, during which time

Parker explained to the Petitioner what had happened. A.52-53.

After staying a short time at the aunt's house, Parker and the Petitioner left in a taxi which the Petitioner had called. Parker sat in the back seat on the passenger's side while the Petitioner sat behind the driver. The Petitioner then proceeded to give the driver directions to her parents' home. The taxi was stopped by a police car approximately three or four blocks from the aunt's house. As the officers approached the taxi, the Petitioner told Parker that she had placed the gun under the seat. Parker and the Petitioner were then taken into custody. A.54-55.

Parker testified that he and the Petitioner told the police that he was from Chicago and was currently renting a room from the Petitioner's mother. The Petitioner and Parker were released a short while later and returned to the Lockett residence and discovered that Dew and James Lockett had also returned home. A.56-57. The police investigation culminated in the arrests of Parker, Dew, James Lockett and the Petitioner.

The above rendition of facts was presented to the trial court through the testimony of Al Parker. To corroborate this co-defendant's testimony, the State presented the testimony of Ronda Reed, Joanne Baxter, Lowell Hayes, Billy Ray Berry, and James Gasdaglis.

Ronda Reed, an employee of the recruiting station near Syd's Market Loan, testified that she was in front of the pawn shop at the time of the robbery and observed inside, three black males and one white man. Further, Ms. Reed noticed a shiny object in the hand of one of the black men. After the three black males ran

out of the shop, Ms. Reed observed one black subject stuffing a gun into his pants. R II 97-103.

Joanne Baxter's testimony corroborated that given by Al Parker concerning the trip from New York to Akron. Ms. Baxter further testified that the Petitioner, on the way to the Methadone Clinic on Tuesday, January 14, 1975, told Dew and Parker that she knew places that they could "knock off". On the return trip from the Clinic, Ms. Baxter testified that the Petitioner proceeded to show the others the businesses which were possibilities as robbery targets. Ms. Baxter stated that the Petitioner, Dew, Parker, and James Lockett met together on Wednesday morning, January 15, 1975, in one of the bedrooms in Joanne Baxter's apartment. Finally, Ms. Baxter testified that she saw Al Parker Wednesday evening, at which time he advised her of what had happened at Syd's Market Loan. A.69-75.

Lowell Hayes, a driver for the Yellow Cab Company, testified that on Wednesday, January 15, 1975, at approximately 1:30 p.m., he picked up a man and woman at 168 Nieman Street, Akron, Ohio, in Cab #52. Mr. Hayes identified the Petitioner as the woman in question. Mr. Hayes then testified that the Petitioner gave him directions to Tarbell Street which would have been a longer ride than the normal route. Further, Mr. Hayes testified that the normal route from Nieman to Tarbell would have put the cab closer to Syd's Market Loan than the route specified by the Petitioner. Finally, Mr. Hayes testified that the Petitioner first sat in the middle on the back seat, but moved directly behind him when the cab was stopped by the police. Mr. Hayes then drove back to the cab company, checked his cab in and left work for the day at approximately 2:00 or 2:30 p.m. A.80-86.

Billy Ray Berry, another driver for the Yellow Cab Company testified that on Wednesday, January 15, 1975, at 2:30 p.m., he recovered a gun from under the rear of the front seat (driver's side) from Cab #52. Mr. Berry gave the gun to James Gasdaglis, who, in turn, testified that he gave it to Mr. Edick, the cab company supervisor. A.86-88.

By stipulation it was determined that Sydney Cohen died from a single gunshot wound The gun causing the wound was stipulated to have been part of the inventory at Syd's Market Loan. Finally, counsel stipulated that this same gun was recovered from Yellow Cab #52 which had contained Al Parker and the Petitioner.

The Petitioner, in her defense, attempted to present the testimony of Nathan Earl Dew and James Lockett. Both Dew and James Lockett immediately invoked their Fifth Amendment privilege, with their attorneys present. A.88-89 and 95.

SUMMARY OF ARGUMENT

I

The prosecutor's closing remarks focused on the state of the evidence. His statements that the State's evidence was unrefuted was not a comment on the Petitioner's failure to testify. This case is clearly distinguishable from *Griffin v. California*, 380 U.S. 609 (1965). The error, if any, was harmless beyond a reasonable doubt.

II

The Petitioner's sentence was constitutionally imposed. Ohio's capital punishment statute provides sufficient mitigating factors to allow the sentencing authority to consider the Petitioner's character, and the nature of the offense. Although she did not pull the trigger, the Petitioner was a major participant in the murder of Sydney Cohen. She helped plan the robbery, and directed her co-conspirators to the victim's pawnshop. Ohio's statute allows the jury to determine the aggravating circumstance(s) of the crime. The trial court considers the mitigating circumstances. There is no constitutional requirement that a jury participate in sentencing in a capital case. Ohio's statutes do not place a chilling effect on the Petitioner's exercise of her right to be tried by a jury. Finally, there is no requirement that the State bear the burden of proof at a sentencing hearing in a capital case.

III

The veniremen were excused for cause in this case because they could not follow the trial court's instructions, or take an oath as a juror in a capital case. They were not excused solely because they had religious or conscientious scruples against the death penalty.

IV

The Ohio Supreme Court interpreted Ohio's complicity statute consistently with the prior statute, case authority, and the Ohio Legislature's intent in enacting it. The statute merely codified existing case law. There was no change in Ohio's law with respect to aiders and abettors. Thus, the issue of retroactivity has not been properly raised.

I.

PROSECUTOR'S CLOSING ARGUMENT

A. THE PROSECUTOR'S COMMENT THAT THE STATE'S EVIDENCE WAS UNCONTRADICTED WAS A COMMENT ON THE STATE OF THE EVIDENCE, AND WAS NOT A COMMENT ON THE PETITIONER'S FAILURE TO TESTIFY.

The State submits that Petitioner has misapplied *Griffin v. California*, 380 U.S. 609 (1965). *Griffin* dealt with the prosecutor's blatant and continuous references to the defendant's failure to testify. The prosecutor focused on the defendant's failure to testify by linking him to the victim temporally and physically and then stated:

> "He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He

> would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.
>
> "These things he has not seen fit to take the stand and deny or explain.
>
> "And in the whole world, if anybody would know, this defendant would know.
>
> "Essie Mae is dead, she can't tell you her side of the story. The defendant won't." 380 U.S. at 611.

In Petitioner's case the prosecutor's comments were based on the state of the evidence, and not on whether the Petitioner testified or not. The portions of the closing summation quoted by the Petition, when placed in context, do not expressly, or impliedly amount to a comment on the Petitioner's failure to testify.

Additionally the trial court charged the jury in this case, that the defendant "has a constitutional right not to testify. The fact that she did not testify cannot . . . be considered for any purpose." A.118.

This instruction is in sharp contrast to the charge given in *Griffin v. California*, 380 U.S. at 610:

> As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

In *Griffin*, the defendant's failure to testify was re-emphasized, and the jury was instructed to consider this unfavorably against the defendant. There was no such comment by the trial court in this case. In fact, they were instructed not to consider this fact.

Petitioner cites a number of cases, claiming they support her position that the prosecutor's comments were "indirect references" concerning her failure to testify. In *United States v. Walton*, 552 F.2d 1354 (10th Cir. 1977), *cert. denied*, 97 S. Ct. 2685 (1977), the court concluded that comment by defendant's counsel, in a joint prosecution for interstate transportation of forged securities, that defendant "Linda Walton was the only one who took the stand and told you her story", was *not* a prejudicial comment on the remaining two co-defendant's failure to testify. The court looking at the *entire argument* held that:

> We hold that the comments made by Linda's counsel in closing argument cannot be construed to have been manifestly intended or of such character that the jury would naturally and necessarily take them to constitute comments on the failure of the co-defendants to testify. These comments more accurately describe counsel's conviction that Linda's credibility is unchallenged and that her testimony was truthful. The trial court exercised an abundance of care in meticulously instructing the jury that it was not in anywise to consider the failure of Davis and Larry to testify. It is significant, we believe, that neither Davis nor Larry lodged an objection to the remarks of Linda's counsel here complained of for the first time, nor did either move for mistrial. 552 F.2d at 1363.

This rule stated above was also applied in *United States v. Bishop*, 534 F.2d 214 (10th Cir. 1976). There the court held that the prosecutor's comment that the Government's evidence was uncontradicted was *not* "manifestly intended" or of "such a character that the jury would necessarily take it to be a comment on the defendant's failure to testify." 534 F.2d at 220. This is especially so where the facts in issue could have been controverted by persons other than the defendant. The court in *Bishop* rejected the defendant's contention that only his testimony could contradict that of the victim, because no one else was present at the time of the passing of the counterfeit bills. The court reasoned that the knowledge, and intent element, and the facts leading up to the crime could be contradicted by other witnesses, *including cross-examination of a State's witness.* 534 F.2d at 219. *See also, United States v. Sanders*, 547 F.2d 1037 (8th Cir. 1976); *United States v. Lepiscopo*, 458 F.2d 977 (10th Cir. 1972); *United States v. Pritchard*, 458 F.2d 1036, 1047 (7th Cir. 1972).

Petitioner likewise was not the only person who could have contradicted Al Parker's testimony. Petitioner could have contradicted the evidence that she was part of the conspiracy through Joanne Baxter, and thus, disputed each and every element of the charges against her. A.69-80. It is also apparent from the record that Joanne Baxter's cousin, Leon, was present during the planning stages, immediately before the robbery, although he did not take part in the events. A.47-48. He also could have disputed Parker's testimony regarding what occurred immediately prior to the incident.

Taken in the context of the entire closing argument, the conviction should not be disturbed because the focus of the argument was on the state of the evidence and not on the defendant's election not to testify. The State submits that the prosecutor's remarks were not manifestly intended or were of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.

B. THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT WERE HARMLESS ERROR.

The State further submits that the Court should apply the rule set forth in *Chapman v. California*, 386 U.S. 18 (1967), that "unless there is a reasonable possibility that the improperly admitted argument contributed to the conviction, reversal is not required." Applying that rule to this case, the State submits that there is no reasonable possibility that the remarks of the prosecutor, if improperly admitted, contributed to the conviction. *United States v. Biondo*, 483 F.2d 635 (8th Cir. 1973); *United States v. Sanders, supra.*

The jury's attention was first drawn by defense counsel to the Petitioner's decision whether or not to testify. During trial, in front of the jury, Attorney Bayer stated that Miss Lockett would testify after a recess. Miss Lockett thereafter conferred with her mother and decided not to testify. Thus, defense counsel emphasized her failure to testify by its own conduct. To shift the blame to the prosecutor for this change of defense strategy is simply uncalled for.

Additionally, the trial judge gave a specific instruction that the jury could not consider the fact for any purpose that the Petitioner did not testify. Thus, any possible adverse inference the jury may have drawn from the prosecutor's remarks was cured by the trial court's instructions.

Contrary to Petitioner's contention, the evidence against her did not rest solely on Al Parker. Parker's testimony was corroborated, both before, and after the killing to the effect that Sandra Lockett played a leading role in the conspiracy that led to the death of Sydney Cohen. Under these circumstances, the error, if any, was harmless beyond a reasonable doubt.

C. FAILURE TO OBJECT TO THE PROSECUTOR'S REMARKS CONSTITUTES A WAIVER OF THIS ISSUE.

Finally, the State submits that the failure to object to the prosecutor's remarks constituted a waiver of this issue. *See, Estelle v. Williams*, 425 U.S. 501 (1976). Notwithstanding Petitioner's contention, this Court should decline to review this issue because the Petitioner did not object at trial; thus, the trial court did not have an opportunity to remedy the alleged error. *Estelle v. Williams, supra* at 508. *See also, United States v. Walton, supra* at 1363.

II.

A. THE OHIO DEATH PENALTY STATUTE PLACES UNCONSTITUTIONAL LIMITATIONS UPON THE CONSIDERATION OF MITIGATING CIRCUMSTANCES.

This Court has expressed two basic concerns in considering the constitutionality of death penalty statutes. *Furman v. Georgia*, 408 U.S. 238 (1972) held that because of the uniqueness of the death penalty, it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Further, in *Woodson v. North Carolina*, 428 U.S. 280,304 (1976), this Court held that ". . . in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles*, 356 U.S., at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Central to this, *Furman* required objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death.

The only capital offense in Ohio under its new criminal code is Aggravated Murder. The death penalty is precluded unless a person is convicted of Aggravated Murder, and an additional aggravating specification, by the trier of facts.

The death penalty is only considered at the sentencing stage if a person is convicted of the principal charge and the specification. The new criminal code limits the aggravating specifications to seven situations:

the assassination of specified officeholders; the offense was committed for hire; the offense was committed for the purpose of escaping detection, apprehension, trial or punishment; the offense was committed while the offender was a prisoner in a detention facility; the offender had previously been convicted of a similar offense, or the offense involved the purposeful killing of or attempt to kill two or more persons; the victim was a law enforcement officer whom the offender knew to be such and the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer; and the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery or aggravated burglary. Ohio Rev. Code Ann. Section 2929.04(A)(Page). (These specifications do not include all the felony murder categories enumerated as part of the main charge. *See* Ohio Rev. Code Ann. Section 2903.01 (Page).) These aggravating specifications specifically limit the class of offenses for which the death penalty is imposed.

In addition, the new criminal code provides for a separate hearing to consider mitigating factors as set out in Ohio Revised Code Section 2929.04(B):

> (B)Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when considering the nature and circumstances of the offense and the history, character and condition of the offender, one or more of the following is established by a preponderance of the evidence:

> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

At the mitigation hearing any relevant evidence may be produced. The Ohio Supreme Court has held that:

> Syllabus 2. Relevant factors such as the age of the defendant and prior criminal record are among those to be considered by the trial judge or three-judge panel in determining whether the existence of a mitigating circumstance pursuant to R.C. 2929.04(B)(2) and (3) was established by a preponderance of the evidence. *State v. Bell*, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976).

While youth of the offender, and his lack of a prior criminal record are not specifically enumerated as separate mitigating factors, they are considered by the Ohio Courts. *Jurek v. Texas*, 428 U.S. 262 (1976), upheld Texas' capital punishment statute even though none of the particularized mitigating factors were enumerated. The constitutionality of the Texas procedures was sustained because they allowed consideration of mitigating factors. *Jurek v. Texas, supra* at 271-272.

Additionally the Ohio Supreme Court has stated:

> 1. For the purpose of the mitigation inquiry, the words "Psychosis or mental deficiency," as contained in R.C. 2929.04(B)(3), authorize the trial judge or panel to see the broadest possible latitude

in determining the defendant's mental state or capacity.

2. Under R.C. 2929.04(B)(3), a convicted defendant's mental state or capacity should be considered in light of all the circumstances, including the nature of the crime itself, so that it may be determined whether the condition found to have existed was the primary producing cause of his offense. *State v. Black*, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976).

An analysis of Ohio's capital punishment statute shows that it is similar to that of Florida. Fla. Stat. Ann., Section 491.141 (West); and *Proffitt v. Florida*, 428 U.S. 242 (1976). The sentencing procedure is at a bifurcated hearing, which only occurs after the trier of facts has found that the offender has committed Aggravated Murder with a particular specification beyond a reasonable doubt.

Petitioner contends that Ohio's capital punishment has the same deficiencies as were found to exist in North Carolina and Louisiana, *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Roberts v. Louisiana*, 428 U.S. 325 (1976), and *Roberts v. Louisiana*, 45 U.S.L.W. 4584 (1977). This is clearly not the case. Those state capital punishment statutes were struck down because they had mandatory death sentences for certain classes of offenders, regardless of the circumstances of the offender.

The State submits that Ohio's capital punishment statute meets the constitutional requirements expressed by this Court in the cases since *Furman*. The new Ohio criminal code provides adequate standards to guide the sentencing authority in the imposition of the death penalty to insure that it is not imposed in an arbitrary

and capricious manner. The jury must first find the offender to have had a purpose to kill, excluding minor participants. They then must find an aggravating specification before the death penalty can be considered. This insures the punishment is not disproportionate to the crime. In the case of felony murder, kidnapping, rape, aggravated arson, aggravated robbery, and aggravated burglary are the only offenses for which the death penalty can be imposed. Further, a mitigation hearing is held to consider other circumstances of the offense and of the individual. A review of the capital punishment cases from Summit County alone shows that the mitigation process does work. Of the 32 defendants indicted for capital offenses, only 15 actually reached the mitigation phase. Mitigation was found to apply to eight of those 15 defendants including Petitioner's co-defendant, Nathan E. Dew. (See Appendix 1 of Respondent's Brief). Notwithstanding Petitioner's contention, she has failed to demonstrate why mitigation should apply in her case.

She was a major participant in the planning, and execution of the crimes committed against Sydney Cohen. She picked the site. She directed the gunmen to the destination. She stayed in the car because she said she knew the victim. She knew that Al Parker had bullets which he was going to put in a gun to effectuate the robbery. The only reason the Petitioner sets forth that she is a minor participant is that she did not enter Sydney Cohen's pawnshop. Should she be rewarded for sending her henchmen to do her dirty work?

Petitioner claims that Ohio's mitigation is too narrow and rigid to allow the trial court to fairly evaluate the Petitioner. What Petitioner is seeking is exactly what

Furman v. Georgia prohibits, i.e., unbridled discretion on the part of the sentencing body.

Gregg v. Georgia, 428 U.S. 153, 195 (1976), states that:

> Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

In Ohio the jury considers the specifications within specific guidelines. The judge considers the mitigating factors within guidelines provided. This Court has also stated that:

> We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for *each distinct system must be examined on an individual basis* (emphasis supplied). *Gregg v. Georgia, supra* at 195.

Respondent submits that Ohio's capital punishment statute is not unconstitutional simply because it is unlike the majority of states which adopted the Model Penal Code structure.

Ohio's statute provides standards to guide, regularize and make reviewable the process of imposing the death penalty. Finally, each case is reviewed by the Supreme Court of Ohio to ensure that the sentencing procedure has been carried out in the proper manner. Ohio Const. Art. IV, Section 2. As stated by the Ohio State Supreme Court:

> We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to a-sure ourselves that capital sentences are fairly imposed by Ohio's trial judges. *State v. Bayless*, 48 Ohio St.2d 73, 86, 357 N.E.2d 1035, 1045 (1976).

B. DEATH PENALTY IS NOT DISPROPORTIONATELY SEVERE AND UNCONSTITUTIONAL FOR ONE WHO IS A MAJOR PARTICIPANT IN THE KILLING OF ANOTHER, ALTHOUGH SHE DID NOT PULL THE TRIGGER.

The Petitioner's contention that her participation in the murder of Sydney Cohen was minor and that, therefore, her death sentence is constitutionally invalid is untenable for the following reasons. First, Section 2923.03 of the Ohio Revised Code provides in part:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: . . .
> (2) aid or abet another in committing the offense . . .
>
> (F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be *prosecuted and punished* as if he were a principal (emphasis supplied).

Further, Section 2903.01(B) Ohio Revised Code, which defines the offense of Aggravated Murder, requires that the homicide be committed purposely. This term is defined in Section 2901.22(A) Ohio Revised Code as follows:

> A person acts purposely when it is his specific intention to cause a certain result, or when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

The State maintains that it is legally impossible for a "minor" participant in a felony murder to become a death penalty candidate because there is the requirement of a purposeful killing in order to be convicted of Aggravated Murder. That is, the Petitioner, as the result of her convictions under these statutes, can no longer be described as a minor participant since the [illegible] of fact made findings of fact to the contrary.

The trial court instructed the jury with regard to purpose, as follows:

> The defendant is charged with aggravated murder. Aggravated murder is the purposeful killing of another while committing or attempting to commit aggravated robbery. Before you can find the defendant guilty you must find beyond a reasonable doubt: 1) that Sydney Cohen was a living person and that his death was caused by the defendant in Summit County, Ohio, on or about January 15, 1975; and 2) that the killing was done purposely; and 3) that the killing was done while the defendant was committing or attempting to commit aggravated robbery.
>
> I have used the word purposely. Purposely is an essential element of this crime. It's an essential element of aggravated murder and aggravated robbery. I will just define this word to you once and it's applicable to aggravated murder and it's also applicable to aggravated robbery.
>
> A person acts purposely when it is his specific intention to cause a certain result. It must be

> established in this case that at the time in question there was present in the mind of the defendant specific intent to kill Sydney Cohen.
>
> Now, purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent means the same thing. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct.
>
> The purpose with which a person does an act is determined from the manner in which it is done, the means and method and weapon used, and all other facts and circumstances in evidence. A.119-120.

Thus, the jury was required to determine that Petitioner acted "purposefully" in order to convict her of aggravated murder.

To now claim that the trial court should be required to reach the opposite conclusion during a mitigation hearing is a legally and logically unsupportable contention. The State submits that the Petitioner had ample opportunity to demonstrate to the jury that her participation in this killing was minor and that she failed to accomplish this goal. Therefore, her guilty verdicts indicate legal culpability equal to that of the triggerman.

Second, in *Scales v. United States*, 367 U.S. 203, 225 (1961), this court held that conspiracy and complicity "are particular legal concepts manifesting the more general principal that society, having the power to punish dangerous behavior cannot be powerless against those who work to bring about that behavior." The perpetration of the Aggravated Robbery may never have

occurred, but for Petitioner's suggestion of Sydney Cohen's pawn shop as a suitable target.

This Court defined the elements of aiding and abetting in *Nye and Nissen v. United States*, 336 U.S. 613, 619 (1949) as follows:

> In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wished to bring about, that he seek by his action to make it succeed." L. Hand, J., in *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

The jury, by its return of a guilty verdict, determined that the Petitioner was acting with the kind of culpability, *i.e.*, purposefulness, required for the commission of Aggravated Robbery and Aggravated Murder. Irrespective of the fact that he did not pull the trigger, she was acting with the same guilty intent as the actual triggerman and, therefore, properly held liable for the consequences. To contend as Petitioner does, that her participation was minor and that her intent was not to take a life, is contrary to the guilty verdict returned by the jury.

Further, courts have consistently held that an aider and abettor may be convicted and punished as a principal. *United States v. Good Shield*, 544 F.2d 950 (8th Cir. 1976), citing *Perevia v. United States*, 347 U.S. 1, 9 (1954); *United States v. Rector*, 538 F.2d 223 (8th Cir. 1976); *Turberville v. United States*, 303 F.2d 411 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 946 (1962).

Creation of a *per se* rule that aiders and abettors are not subject to the death penalty is untenable, because it

promotes smart criminals duping dumb criminals into being the triggerman. The smart criminal can thus avoid the death penalty.

The record herein reflects that the Petitioner was an active participant in conversation with Al Parker, Nathan Earl Dew, and James Lockett concerning the group's need for money. A.40-41. It was the Petitioner who decided that Dew's ring was "too beautiful to pawn" and that a robbery would meet this need. A.41. Further, the Petitioner, by her own initiative, showed several possible "targets" to her co-conspirators, and was fully aware of and consented to the use of a loaded gun to perpetrate the robbery. It was the Petitioner who took the death weapon from Parker after the shooting and attempted to hide it under the seat of the taxi cab. A.55. Finally, the death of Sydney Cohen was not only the proximate result of the Aggravated Robbery, but also was a consequence that could have reasonably been anticipated by the participants. The State submits that the Petitioner was a full and willing participant in the midday slaying of Cohen during the course of a robbery and should be punished, in accordance with Ohio and Federal statutory and common law, as a principal. The Petitioner has failed to demonstrate the constitutional invalidity of this established rule of law and is, therefore, not entitled to the relief requested.

Finally, Petitioner contends that the Ohio's death penalty is arbitrarily, and capriciously imposed because it is applied to felony murders, and not to certain other categories of murder. In making this argument Petitioner overlooks the facts of the offense for which she was tried. It is precisely this type of offense, a robbery in

which the only witness is eliminated, that the Ohio Legislature sought to punish by the death penalty. The categories of murder have been narrowed to focus on the killing of human beings in situations where the offenders calculate the risks, prepare themselves with the means to carry out their ends, and perform the scenario according to plan. The conspiracy leading to the death of Sydney Cohen falls within this framework exactly. The Respondent submits that this type of conduct is what the Ohio Legislature sought to punish, and deter.

C. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT A JURY TAKE PART IN SENTENCING IN A CAPITAL CASE.

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968), but is has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases. *Proffitt v. Florida, supra* at 252.

This proposition has been followed by the Ohio Supreme Court. *See, e.g., State v. Weind*, 50 Ohio St.2d 224, 226, 364 N.E.2d 224, 227-228 (1977). It is a somewhat anomalous argument to say that juries will sentence more even handedly than judges in capital cases. The Petitioner's position seems to advocate that

juries be permitted to determine whether a capital sentence will be imposed without formal guidelines or channels. The unbridled jury discretion was exactly what *Furman* sought to eliminate. *Gregg v. Georgia, supra.* Juries do not ordinarily take part in the sentencing procedures in our system of criminal justice. They have only one opportunity to exercise this function, in a capital case. To say that they will be less arbitrary and capricious than a trial judge who is experienced in the area of sentencing as it applies to the entire milieu of criminals defies logic. A jury does not have the ability to compare the offender before it, with the other defendants similarly situated.

Other states which have a bifurcated procedure in a capital case require the trial judge(s) to preside at the sentencing hearing. (e.g. Arizona, Florida, Illinois, Indiana, Montana, and Nebraska. See Appendix 2 for statutory citations).

Petitioner remarks that jury nullification is minimized by taking unbridled jury discretion away from juries in the face of mandatory death penalties, but implies that Ohio has a problem with jury nullification. That argument is specious for two reasons. First, Ohio does not have a mandatory death penalty. Second, the jury does not make the sentencing decision. Thus, the likelihood of jury nullification is reduced, not increased.

Petitioner asserts that the jury should have the opportunity to weigh the aggravating and mitigating factors. It should be emphasized again, that the jury does determine the presence or absence of aggravating specifications. The jury considers the more factual aspects of the death penalty decision in considering whether a specification exists, or not. For example, in

the instant case the jury found the Petitioner guilty of murder during the commission of Aggravated Robbery. Ohio Rev. Code. Anno., Section 2929.04(A)(7) (Page).

Before the mitigation hearing the trial court is required to have a pre-sentence investigation and a psychiatric examination made. Ohio Rev. Code Anno., Section 2929.03(D) (Page). These reports provide a wealth of information concerning "the character, conduct and record of the individual offender." Thus, the judge considers the usual sentencing criteria, in the mitigation hearing. The defendant has the advantage of a jury making statutorily guided decisions, and a judge evaluating him on an individual basis before the imposition of the death penalty.

If this Court determined that Florida's capital punishment statute withstood constitutional muster, *Proffit v. Florida, supra*, then Ohio's statute should likewise meet both the aggravating, and mitigating factors. In Ohio, the jury has already determined that an aggravating factor existed beyond a reasonable doubt. Accordingly, one must conclude that Ohio has gone further than the Supreme Court has required, in allowing the jury to take part in a portion of the death penalty decision making process. Since there is no constitutional requirement that a jury must take part in the sentencing process, Petitioner's argument herein is without merit.

D. OHIO CAPITAL SENTENCING PROCEDURES DO NOT IMPERMISSIBLY PENALIZE EXERCISE OF THE RIGHT TO PLEAD NOT GUILTY, AND TO HAVE A JURY TRIAL.

Petitioner misapplies *United States v. Jackson*, 390 U.S. 570 (1968). That case held that a federal statute had an impermissibly chilling effect upon the right to trial by jury because it allowed the death penalty in kidnapping cases where trial was by jury, but did not permit the death penalty where trial was by the court.

This is not the case in Ohio. Under the Ohio statute, the death penalty is applicable whether trial is by jury or a three judge panel. The death penalty may be avoided under either choice.

The chilling effect on the right to trial by jury found in *United States v. Jackson, supra*, is simply not present in this case. *State v. Weind, supra*, 50 Ohio St.2d at 228-229 364 N.E.2d at 229, and *State v. Bell, supra*, 48 Ohio St.2d at 275, 358 N.E.2d at 561-562. Petitioner's conclusion that there is a more lenient sentencing standard for a three judge panel is unsupported. See, *State v. Bell, supra*, 48 Ohio St. 2d at 275-276, 358 N.E.2d at 561. Whether there are three judges or one judge, they are presumed to follow the law.

Petitioner's contention that a defendant is compelled to plead guilty to Aggravated Murder because of different sentencing consideration is without merit. Petitioner refused to plead to Voluntary Manslaughter, which carries a 4-25 year sentence. To say that she had the choice of either pleading guilty, or not guilty to Aggravated Murder with specifications is simply just not

true. Petitioner made her choice. She should not be able to create error by her own conduct.

Additionally, the Respondent submits that the Petitioner's hypothetical plea of guilty to a capital case is simply unwarranted and unrealistic. In Summit County in almost every case the defendant has been offered a plea without specifications. No one has pled guilty to Aggravated Murder with specifications, i.e., in a capital case. (See Appendix 1). Whether a defendant pleads guilty, or is found guilty of a capital offense he still faces the possibility of the death penalty. *United States v. Jackson, supra*, is likewise inapplicable under these circumstances. Thus, there is no chilling effect on a defendant's right to a jury trial.

Finally, the Respondent submits that Ohio Criminal Rule 11(C)(3) is unconstitutional under the provisions of Section 5 of Article IV of the Ohio Constitution, if there is any conflict with the right to a jury trial. In Ohio the Rules of Criminal Procedure are promulgated by the Ohio Supreme Court. Those Rules are valid, and binding on all courts in Ohio unless they abridge, or modify a substantive right. *See State v. Wallace*, 43 Ohio St.2d 1, 330 N.E.2d 697 (1975) and *State v. Hughes*, 41 Ohio St.2d 208, 324 N.E.2d 731 (1975). If in fact the Ohio Criminal Rule provides a different standard than Ohio Revised Code Section 2929.04(B) which abridges, or modifies the rights set out therein, the Rule is unconstitutional.

E. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE STATE BEAR THE BURDEN OF PROOF AT A SENTENCING HEARING IN A CAPITAL CASE.

Mullaney v. Wilbur, 421 U.S. 684 (1975) held that the Due Process Clause of the Fourteenth Amendment requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. The Court held that the Maine statute requiring the defendant to prove that he acted in the heat of passion or sudden provocation in order to reduce the homicide to manslaughter, violated this requirement, and that in fact the State was required to prove the absence of this fact.

Respondent strongly contends that the rule of law enunciated in *Mullaney* does not apply to sentencing. One can readily distinguish proof of an element of a crime. The Respondent accepts the burden of proving each element of the crime of Aggravated Murder beyond a reasonable doubt. It did so in this case. *Compare Patterson v. New York*, 97 S. Ct. 2319 (1977).

However, sentencing and the procedures therein are a different matter. In *State v. Downs*, 51 Ohio St.2d 47, 364 N.E.2d 1140 (1977), the Ohio Supreme Court overruled paragraphs 11 and 12 of the syllabus of *State v. Lockett*, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976), and the language which appears in *State v. Woods*, 48 Ohio St.2d 127, 135, 357 N.E.2d 1059, 1065 (1976), which reads: "(t)his is particularly true since the defendant is required to establish duress or coercion by a preponderance of the evidence for purposes of mitigation". In neither case did the trial court require the

defendant convicted of Aggravated Murder to prove certain mitigating circumstances by a preponderance of the evidence in order to be sentenced to life imprisonment, rather than to death. Thus, the cited sections were held to be dicta.

The *Downs* opinion stated that it is the court that has the initial responsibility to require certain evidence to be collected and certain examinations to be made. From a careful consideration of those reports and of the evidence presented during the course of the trial, the judge, or panel of judges, decides whether mitigation is established by a preponderance of the evidence. If the defendant chooses not to present any evidence, the trial court may nonetheless find in his favor. If he chooses to present evidence, the court must consider any such testimony or documentary proof relevant to the sentencing decision. This requires that the defendant bear the risk of nonpersuasion during the mitigation hearing, but does not impose an unconstitutional burden upon a defendant which would render the Ohio statutory framework for the imposition of capital punishment unconstitutional. Nor, does it make the lack of mitigating factors an additional and constitutionally mandated element of a capital offense, and the state is not constitutionally required to prove the lack of such mitigating factors beyond a reasonable doubt. However, the defendant does not have the burden of proof either. She simply risks the burden of nonpersuasion. *State v. Downs, supra*. In the final analysis the trial court has the burden of determining if a mitigating factor exists.

This Court sustained Florida's capital sentencing structure which is similar to the Ohio statute. *Proffitt v. Florida, supra*. In determining that the death sentence

should be imposed, the trial judge need only find that the mitigating factors are insufficient to outweigh the aggravating factors. Fla. Stat. Ann., Section 921.141(3) (Supp. 1976-1977). Even when the jury recommends life, the trial judge may impose the death penalty where the facts supporting the death penalty are so clear and convincing that "virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975).

Respondent submits that there are no constitutional infirmities in the mitigation portion of its capital punishment statute.

III.

IN A CAPITAL CASE, VENIREMAN ARE PROPERLY EXCUSED FOR CAUSE WHERE THEIR CONSCIENTIOUS SCRUPLES ABOUT CAPITAL PUNISHMENT PRECLUDE THEM FROM FOLLOWING THE JUDGE'S INSTRUCTIONS, OR TAKING AN OATH AS A JUROR.

The State respectfully submits that the Petitioner's reliance on *Witherspoon v. Illinois*, 391 U.S. 510 (1968) is misplaced in that Mr. Justice Stewart began his discussion of the first issue by stating:

> "The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who stated that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the State's assertion of a right to exclude

> from the jury in a capital case those who say that they could never vote to impose the death penalty . . ." 391 U.S. at 513-514.

The subject of capital punishment was broached during voir dire for the sole purpose of determining which veniremen could not perform their sworn duties as jurors because of their views on the death penalty. The State submits that those prospective jurors who were excused for cause, were so excused, solely because their steadfast conviction against capital punishment would not allow them to take the oath, to perform their duty as jurors to follow the law in accord with the evidence. Because of their views on capital punishment, they could not . . . "follow conscientiously the instructions of (the trial judge . . ." *Boulden v. Holman*, 394 U.S. 478, 484 (1969). The correctness of this position is manifested not only through the natural understanding of the record, but is bolstered by the fact that Dorothy Tiell, one of the prospective jurors examined on this topic, was not excused for cause since she was the only one of five who represented that she could and would follow the law in view of the evidence, despite personal feelings about the death penalty and its possible imposition. Contrary to Petitioner's position, the duties of jurors were adequately explained during *voir dire.* A.6 and 8-14.

The State did not, contrary to the Petitioner's wholly unsupported allegation, attempt to disqualify any venireman simply because he or she was opposed to capital punishment. There is simply no comparison between this case and *Witherspoon.* In *Witherspoon*, the court noted that:

> "... the tone was set when the trial judge said early in the voir dire, 'let's get these conscientious objectors out of the way, without wasting any time on them.' In rapid succession 47 veniremen were successfully challenged for cause on the basis of their attitudes toward the death penalty. Only five of the 47 explicitly stated that under no circumstances would they vote to impose the death penalty." 391 U.S. at 514.

In the present case, only four members of the entire venire were excluded for cause based on their views of capital punishment. Each of the four stated that their views precluded them from taking the oath, notwithstanding the evidence, or the judge's instructions. Thus, the trial court went the extra step required by *Witherspoon*. None of the veniremen in the present case were excused simply because they had qualms or conscientious scruples about capital punishment. *Compare Witherspoon, supra* at 513, *Boulden, supra* at 483, and *Maxwell v. Bishop*, 398 U.S. 262, 264 (1969).

Counsel for the Petitioner was afforded broad latitude by the trial court in pursuing their *voir dire* examination. Defense counsel chose not to inquire further on the topic, and specifically stated that there was no objection to those prospective jurors being excused. A.11.

Finally, the State maintains that no prejudice has been shown by the Petitioner, because the jury does not consider the penalty in Ohio. Ohio has a separate penalty, or sentencing hearing after the jury determines the question of guilt. Ohio Rev. Code Ann. Section 2929.03(C) (Page). The jury does not take part in the sentencing phase of the case. Accordingly, the State contends that no prejudice can attach to the Petitioner

if veniremen are questioned on the subject of capital punishment.

IV.

THERE IS NO ISSUE OF RETROACTIVITY WHERE THERE HAS BEEN NO CHANGE IN THE JUDICIAL INTERPRETATION OF A STATUTE.

Petitioner bases her final argument on her belief that the Ohio Supreme Court's "surprising interpretation" of Ohio Revised Code Section 2923.03(A) was an "anomalous construction" that was reached "retroactively without warning". Petitioner contends that the opinion required no proof of culpability to convict and punish an aider and abettor as a principal. On the contrary, throughout the opinion the court emphasizes, proof that the Petitioner had purposeful intent to kill is established through her participation in a criminal conspiracy which would be reasonably likely to produce death.

The State submits that this interpretation is neither surprising, nor anomalous. It is consistent with the pre-1974 case law that the Legislative Service Commission states is codified in Ohio Revised Code Section 2923.03, effective January 1, 1974. The essence of these cases is that through participation in a criminal conspiracy that is reasonably likely to produce certain results, the intent to produce those results can be inferred. *See, State v. Doty*, 94 Ohio St. 258, 113 N.E. 811 (1916), and *State v. Farmer*, 156 Ohio St. 214, 102 N.E.2d 11 (1951). Petitioner contends that prior to

the time that the new criminal code became effective, an aider and abettor could be prosecuted and punished as if he were the principal offender, whether or not he possessed the same "mens rea" as the principal offender. This is not the case.

In Ohio, intent or purpose to kill has always been a requirement before an aider and abettor could be convicted of murder. That intent or purpose has consistently been inferred or presumed on the part of a co-conspirator in the case of a criminal conspiracy. *State v. Lockett*, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976) and cases cited therein A. 204-208. As noted in Section II(B) of Respondent's brief, the trial court charged the jury in accordance with the time honored rule in Ohio.

The State respectfully submits that the case law has consistently followed this principal, and the trial court properly relied on it. In *State v. Palfy*, 11 Ohio App.2d 142, 229 N.E.2d 76 (1967), a case remarkably similar to the instant case, the court held:

> If the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal killer as an aider and abettor in the homicide, even though the aider and abettor was not aware of the particular weapon used to accomplish the killing. An intent to kill by the aider and abettor may be found to exist beyond a reasonable doubt under such circumstances. *See also, State v. Doty*, 94 Ohio St. 258, 113 N.E. 811 (1916).

The State respectfully submits that in light of pre-1974 case law and its subsequent codification, the Petitioner certainly had fair notice that by participating

in the planning and commission of the robbery and by acquiescing in the use of a deadly weapon to accomplish the robbery, she would be held liable for the taking of the victims life which was endangered by the manner and means of performing the act conspired. Petitioner was "acting with the kind of culpability required for the commission of an offense" when she knowingly participated in the criminal conspiracy.

The State strongly objects to Petitioner's characterization of her conduct as being of a lesser culpable nature than co-conspirator Parker's. The Ohio Ninth District Court of Appeals, and the Ohio Supreme Court, recognized just exactly how culpable Petitioner was. Her purpose to kill was just as firmly established under the circumstances as though she had pulled the trigger herself. Petitioner selected the site, and directed her henchmen into Sydney Cohen's pawnshop. But for Sandra Lockett's directions, Sydney Cohen would be alive today.

Finally, Petitioner is attempting to create a constitutional issue where none exists. Petitioner is attempting to have the Supreme Court interpret a state statute through the artifice of a claimed retroactive interpretation of the statute. As previously indicated, the interpretation of this code section was entirely consistent with previous case law. *Linkletter v. Walker*, 381 U.S. 618 (1965). Without the retrospective application claim, the only issue before the court is one of statutory construction. Justice Stewart in *Shuttleworth v. Birmingham*, 382 U.S. 87, 92 (1965), stated that "It is our duty, of course, to accept the state judicial construction of the ordinance." *Winters v. New York*, 333 U.S. 507 (1948). Accordingly, this Court

should accept the Ohio Supreme Court's construction that the statute, and the case law remain the same, and not allow Petitioner to bootstrap this issue into one of constitutional dimension by raising the specter of retroactivity.

CONCLUSION

The Respondent respectfully submits that Ohio's death penalty is not imposed in an unconstitutional manner. The Ohio Legislature has narrowed the application of the death penalty. It still includes certain felony murders, such as occurred in this case: a robbery-murder executed with a gun. Ohio provides each defendant with a mitigation hearing which focuses on the individual petitioners character, and the nature, and circumstances of the crime. The Ohio Appellate and Supreme Courts review each capital case. Thus, the Ohio statutes provide the procedures which this Court has dictated are necessary to constitutionally impose the death penalty.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I, CARL M. LAYMAN III, being a member of the bar of the United States Supreme Court, do hereby certify, pursuant to Supreme Court Rule 33(3)(b), that 3 copies of the Brief of Respondent was mailed, first class postage paid, to MAX KRAVITZ, 793 Pleasant Ridge, Bexley, Ohio 43209, JOEL BERGER, Suite 2030, 10 Columbus Circle, New York, New York 10019, and ANTHONY G. AMSTERDAM, Stanford University Law School, Stanford, California 94305; Attorneys for Petitioner.

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APPENDIX ONE

REVIEW OF DISPOSITIONS OF CASES OF AGGRAVATED MURDER WITH SPECIFICATIONS.

DEATH PENALTY	*SUMMIT COUNTY COMMON PLEAS NUMBER*
1. Carl L. Bayless	74-3-244
2. Floyd Edwards	75-1-52
3. Sandra Lockett	75-1-96
4. James Lockett	75-1-98 reversed and retried
5. William Perryman	75-3-436(A)
6. Stacey Lane	75-5-6-1
7. George Harris	77-05-0538
MITIGATED BY TRIAL COURT	
8. Carmen Williams	74-10-1112
9. Johnny Roper	75-1-1
10. Nathan E. Dew	75-1-99
11. Wendell Pitts	75-3-436(B)
12. Larry Smith	76-3-383
13. Terry Achberger	76-4-436(B)
14. Danny Teter	74-4-436(E) reversed and pending new trial
15. James Graham	76-4-446
NO SPECIFICATION RETURNED BY JURY	
16. Danny Maglio	74-2-104
17. Nita Small	74-10-243(A)
18. August Cassano	76-2-243(A)
LESSER INCLUDED OFFENSE FOUND	
19. Phillip Tate	77-08-0854 Voluntary Manslaughter

PLEA TO AGGRAVATED MURDER SPECIFICATION DISMISSED	*SUMMIT COUNTY COMMON PLEAS NUMBER*
20. Al Parker	75-1-97 for testimony
21. Delbert Richmond	75-3-436(C) for testimony
22. David Harris	75-6-729
23. Jackie Collins	76-1-25(A)
24. Michael Spueller	76-1-25(B)
25. Dale Collins	76-2-196
26. James Davenport	76-1-243(B) for testimony
27. Donald Webb	76-4-436(A) for testimony
28. Joshua Huffman	76-6-687
29. John Beason	76-11-1249
ACQUITTALS	
30. Larry Favors	75-11-1419
31. Wilford Hyde	76-4-436(C)
32. Frank Sperrow	76-4-436(D)

APPENDIX TWO

1. Ariz. Rev. Stat. Section 13-902(B), Former Section 13-565 (Supp. 1977)
2. Fla. Stat. Ann. Section 921.141(2) (West. Supp. 1976)
3. Ill. Ann. Stat. ch. 38 Section 1005-8-1A(6) (Smith-Hurd Supp. 1977)
4. Ind. Code Ann. Section 35-50-4-1(e)(2) (Burns Supp. 1977)
5. Mont. Rev. Codes Ann. Section 95-2206.6 (1977)
6. Neb. Rev. Stat. Section 29-2522 (1977)